No. 94-1474

In The

Supreme Court of the United States

October Term, 1994

STATE OF IDAHO; PHIL BATT, Governor; PETE CENARRUSA, Secretary of State; ALAN G. LANCE, Attorney General; J.D. WILLIAMS, Controller; ANNE FOX, Superintendent of Public Instruction; KEITH HIGGINSON, Director, Dept. of Water Resources; each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES,

Petitioners,

v.

COEUR D'ALENE TRIBE, in its own right and as the beneficially interested party subject to the trusteeship of the United States of America; ERNEST L. STENSGAR, LAWRENCE ARIPA, MARGARET JOSE, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of Coeur D'Alene Tribe,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, HAWAII, KANSAS, MICHIGAN, MINNESOTA, MONTANA, OREGON, SOUTH DAKOTA, UTAH AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Should the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) be expanded to permit judicial relief amounting to the adjudication of title, when such a case would otherwise be prohibited by the Eleventh Amendment?

2. Does the presumption against conveyances by the federal government of navigable waters held in trust for the future states apply to the establishment of reservations by an executive order totally lacking any indication of intent to convey title to such waters?

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INTEREST OF AMICI

The constitutional immunity of states from federal court jurisdiction in the absence of waiver or a consent "inherent in the constitutional plan" is basic to our federal system. The Court has already rejected efforts to exempt both Indian tribes and foreign nations from its broad scope. *Blatchford* v. *Native Village of Noatak*, 111 S.Ct. 2578 (1991); *Monaco* v. *State of Mississippi*, 292 U.S. 313 (1934). Much of the efforts and analysis in a long history of Eleventh Amendment jurisprudences will have been in vain, however, if the simple device asserted below will suffice to confer jurisdiction nevertheless.

The potential scope of this case goes far beyond disputes between tribes and states. If the officers' suit, coupled with declaratory relief, is available as a means of evading the restrictions of the Eleventh Amendment on federal jurisdiction, little will remain of it, for any imaginative counsel will be able to characterize virtually every complaint as a continuing violation of federal law requiring declaratory and injunctive relief.

The issue will invariably arise in other cases, if it is not resolved now. Disputes between states and tribes over land titles and reservation boundaries – notably the issue of inclusion of navigable waters – have arisen with respect to three different tribes along the Colorado River, *Arizona* v. *California*, No. 8, Original. Presently, the Department of Interior recognizes 306 tribes in the lower 48 states and another 220 entities in Alaska, where native corporations claim over 44 million acres. Fifty two million acres of trust land are held by tribes and individual Indians. Wilkinson, American Indians, Time and The Law

8 (1987). Much of this land was withdrawn by presidential executive orders. Over 190 executive orders were issued establishing or modifying the boundaries of Indian reservations were issued prior to 1904. 1 Charles J. Kappler, Indian Affairs: Laws and Treaties 801-936 (1904). After 1910, an additional 63 orders establishing reservations or adding acreage to existing ones were made by the executive branch. 3 Charles F. Wheatley, Jr., Study of Withdrawals and Reservations of Public Domain Lands, Public Land Law Review Commission C-6, C-7.

And the practice may well be carried beyond state-tribal disputes. Since the initial boundary between state navigable waters and the upland is determined by federal law, *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), virtually any riparian or littoral landowner might attempt to utilize the federal courts to try what is essentially a local real property dispute. The Ninth Circuit opinion, if left standing, will invite a flood of title litigation in the federal courts.

It is particularly disturbing that the decision below deals so blithely with disposition of the states' navigable waters – long characterized by this Court as an essential attribute of state sovereignty. The navigable waters come to the states as a constitutional entitlement, not a discretionary grant by Congress. *Oregon* v. *Corvallis Sand & Gravel Co., supra*, 429 U.S. at 374. These waters were held in trust for the future states by Congress, and once statehood takes place, are held in public trust by the states for their people. Just as their alienation by states is strictly limited, *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387 (1892), pre-statehood conveyances by Congress are not to be presumed, but must be made in clear and uncertain

terms. Where, as here, the claim of respondents rests on an ambiguous executive order unsupported by any such unequivocal expression by Congress, there is no basis for an action abrogating at once the Eleventh Amendment and the equal footing doctrine.

SUMMARY OF ARGUMENT

Where the goal of litigation is adjudication of title to land, the strictures imposed on federal jurisdiction by the Eleventh Amendment may not be evaded by filing an action for injunctive and declaratory relief. This Court has properly held in the context of federal law that an officers' suit may not be used in the place of a quiet title action. Other federal courts of appeal have held that actions involving claims of title to land must be resolved in the context of a quiet title action. Resolution of this question is necessary not only because of its importance, but because of the split of authority now extant.

Assuming that state officers may be restrained by a federal court from acting inconsistently with a title allegedly rooted in federal law, such an action will not lie where the State has a colorable claim. A federal district court may properly decide that no claim arises against the state s[illegible] by virtue of an executive order having the effect of [illegible]mpassing navigable waters within a tribal reservation.

The presumption against the pre-statehood conveyances of navigable waters cannot be overcome in the absence of express and explicit congressional intent to make such a conveyance in order to carry out some

international duty or public exigency. Where, as here, the action at issue consists of an Executive Order unsupported by such an expression, the presumption cannot be overcome.

Failure to resolve this issue will result in different rules in different circuits. Already the First, Fifth and Seventh Circuits have indicated a varying interpretation of Eleventh Amendment principles in this context, and even several opinions from the Ninth Circuit diverge from the expansive decision at issue here. A constitutional rule rooted in federalism deserves a more consistent resolution.

STATEMENT OF THE CASE

This action arises from the efforts of an Indian tribe to quiet title to the beds, banks and waters of all the navigable waterbodies within its reservation – including Lake Coeur d'Alene – and to oust the State of Idaho of jurisdiction over them. Corollary to this goal, the tribe seeks to enjoin the State, its agencies and officials from taking any action inconsistent with its asserted title.

The State of Idaho moved to dismiss – challenging the jurisdiction of the federal district court on Eleventh Amendment grounds and at the same time asserting that the complaint failed to state a claim upon which relief may be granted. Although the district court granted the motion, *Coeur d'Alene Tribe of Idaho* v. *State of Idaho*, 798 F.Supp. 1443 (D. Ida. 1992), the Court of Appeals disagreed. It held, in effect, that notwithstanding the State's Eleventh Amendment immunity from federal jurisdiction

over the quiet title action, the state officers could be enjoined from asserting the very same title which the court was constitutionally prohibited from adjudicating. *Coeur d'Alene Tribe of Idaho* v. *State of Idaho*, 42 F.3d 1244 (9th Cir. 1994).

ARGUMENT

I

INTRODUCTION

Four years ago, this Court laid to rest the issue of state immunity from suit in federal court by Indian tribes. It firmly rejected the notion that the strictures of the Eleventh Amendment were inapplicable to such actions. *Blatchford* v. *Native Village of Noatak, supra*, 111 S.Ct. 2578 (1991). However, it left for another day whether the states' Eleventh Amendment immunity could be breached by an action for *injunctive* relief. *Id.* at 2586. Now another tribe seeks to take advantage of this question, and the majority of a Ninth Circuit panel has approved its argument that the federal courts may entertain in an officer's suit for injunction and declaration of rights what this Court has said they may not adjudicate in an action for substantive relief.

The issue is one of concern to all the amicus states represented herein, for the exception espoused by the Ninth Circuit threatens to swallow up the rule. If Eleventh Amendment immunity is to be anything more than the fading smile of a juridical Cheshire cat, it must be

applied by the Court in the context in which it is presented here.

II

THE ELEVENTH AMENDMENT PROHIBITS SUITS BY A TRIBE AGAINST A STATE. THE EXCEPTION FOR INJUNCTIVE RELIEF SET FORTH IN EX PARTE YOUNG IS INAPPLICABLE WHERE, AS HERE, THERE IS NO VIOLATION OF FEDERAL LAW

A. The "Officers' Suit" is Unavailable in the Absence of a Convincing Showing that Federal Law is Being Violated.

Under *Ex parte Young, supra* at 123, "officers' suits" for injunctive relief may be available against state officials even where the state on whose behalf they purport to act is immune. This exception to Eleventh Amendment immunity, however, is based on the doctrine of ultra vires, and must be construed narrowly. *Pennhurst State School and Hosp.* v. *Halderman*, 465 U.S. 89, 99, 114, n. 25 (1984). A state officer acts ultra vires only when the action is taken "without any authority whatever." *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982). Where, as here, the district court examined the record and found no violation of federal law, no basis exists for equitable jurisdiction.

"Officers' suits" are available against state officials only where their conduct is unauthorized or unconstitutional. *Ex parte Young, supra*. Where, as here, the district court examined the record and found no showing of federal law violation, no basis existed for enjoining state officials and agencies.

The district court's decision was well founded. The presumption against federal conveyance of navigable waters, held in trust for the future states, has been respected by this Court since its earliest days. *Pollard's Trustee* v. *Hagen*, 44 U.S. (3 How.) 212, 222 (1845). Prestatehood grants have been made only under "the most unusual circumstances," *Utah Div. of State Lands* v. *U.S.*, 482 U.S. 193, 197 (1987), and only "international duty or public exigency" has compelled Congress to take such actions. *Shively* v. *Bowlby*, 152 U.S. 1, 48-50 (1894).

This rule has been applied expressly to Indian tribes. This Court has stated that such conveyances are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926).

Furthermore, such a conveyance must leave no doubt that it was intended to "embrace the land under the waters of the stream." *Montana* v. *U.S.*, 450 U.S. 549, 552 (1981). Such an express intent on the part of Congress must exist to find that such lands have been reserved prior to statehood as well as granted. The presumption against a prestatehood grant or reservation can only be overcome if it is shown 1) that Congress clearly intended to include the submerged land within the reservation and 2) Congress affirmatively intended to defeat the future state's title to the submerged land. *Utah Div. of State Lands* v. *United States, supra* 482 U.S. at 193, 201-202; see Conference of Western Attorneys General, American Indian Law Deskbook 54-60 (1993).

In this case, the executive reservation on which the tribe relies merely included various of the state's navigable waters, including Lake Coeur d'Alene, within the reservation boundaries. Nothing in that action had the effect of conveying its beds, banks and waters to the tribe. Indeed, it is commonplace for state navigable waters to run through Indian reservations, and that fact has no effect on title to them. See United States' Response to the State Parties' Motion for Summary Judgment, Before the Special Master, *Arizona* v. *California*, *supra*.

B. The "Mutuality" Test Established by this Court is Not Met Here, Where States are Held Susceptible to Federal Suit but Tribes Are Not.

In *Blatchford* v. *Native Village of Noatak*, *supra*, 111 S.Ct. at 2582-2583, this Court observed that a controlling factor in finding a surrender of State sovereignty "inherent" in the plan of the constitutional convention is the element of mutuality. Thus suits by one state against another are permissible, but suits by Indian tribes cannot be presumed to have been countenanced in the plan of the convention because there was no mutual surrender of tribal sovereignty to the State. *Id.* at 2583. Here, if the State attempted to sue tribal officials, sovereign immunity would undoubtedly be raised as a defense. It cannot be assumed that the states contemplated such a one-way surrender of their own immunity.

III

THE DECISION BELOW TO ALL PRACTICAL EFFECTS PROVIDES A QUIET TITLE REMEDY IN FEDERAL COURT IN CONTRAVENTION OF THIS COURT'S NOATAK OPINION. ITS EFFECT IS TO DIMINISH STATE ASSETS AND INTERFERE WITH PUBLIC ADMINISTRATION

A. An Officers' Suit May Not Be Used as a Substitute for a Quiet Title Action.

A suit is against the sovereign if the judgment "would expend itself on the public treasury or domain, or interfere with the public administration." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). Since this principle stems from the sovereign immunity doctrine, decisions of this Court dealing with the federal government in like context are instructive. This Court held in *Block* v. *North Dakota*, 461 U.S. 273 (1983), that an officers' suit may not be used as a substitute for a *federal* quiet title action. Its reasoning is applicable here. In *Block*, this court expressly rejected the officer's suit as "a device for circumventing federal sovereign immunity." *Id.*, 461 U.S. at 281. In an opinion echoing *Ex parte Young* principles, this Court concluded that the officer's suit in an action affecting property will be available "only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.'." *Ibid.*, quoting *Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 702 (1949). Here, no showing has been made that the defendant state officers and agencies are acting unconstitutionally or beyond their authority. There is no "unequivocal" expression on the part of Congress to

overturn the analagous Eleventh Amendment immunity of states. Cf. *Pennhurst State School & Hosp.* v. *Halderman, supra*, 465 U.S. at 99.

In hearings on the Federal Quiet Title Act, this Court concluded it had been the "predominant view" that citizens asserting title to or the right to possession of lands claimed by the United States were without judicial remedy because of the doctrine of sovereign immunity. *Block* v. *North Dakota, supra*, 461 U.S. at 282. A contrary construction, the Court observed, would render nugatory the careful scheme for adjudicating a quiet title action, and would permit institution of an unlimited number of stale claims because no statute of limitations would be applicable. *Id.* at 285.

In dealing with questions of sovereign immunity, the Court's reasoning applies equally well to the States as to the Federal Government. Waivers of sovereign immunity are to be strictly construed, whether with regard to states or the federal government. Cf. *Block* v. *North Dakota, supra*, 461 U.S. at 287; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979).

B. The Opinions of Other Circuits Support the View That the Relief Sought Here is Equivalent of Quiet Title and Thus Precluded.

The decisions of other circuits are more consistent with Eleventh Amendment jurisprudence as this Court has enunciated it. In *John G. and Marie Stella Kennedy* v. *Mauro*, 21 F.3d 667 (5th Cir. 1994), boundary and title issues were similarly raised in an action for declaratory and injunctive relief against the Texas Commissioner of State Lands.

The court had no difficulty in finding that to provide the relief sought, an adjudication of title would be necessary. The action was accordingly dismissed. And in *Fitzgerald* v. *Unidentified Wr. & Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989), the court held that jurisdiction was lacking in an in rem action involving a submerged wreck when the relief sought was an injunction against government officers from interfering with the property. In *Toledo, Peoria & Co. Ry. Co.* v. *Illinois*, 744 F.2d 1296 (7th Cir. 1984), cert. den., 470 U.S. 1051 (1985), the court declined to entertain an action in which plaintiffs sought an order compelling state officials to restore possession of disputed property to the plaintiff.

Even courts in the Ninth Circuit have been less than in lockstep on this issue. In *Aguilar* v. *Kleppe*, 424 F.Supp. 433 (D. Alaska 1976), plaintiffs sought an order compelling the State to set aside certain selections of federal land. The court observed that the suit "if successful, will cause the State to lose land to which it has received patents from the United States," and therefore the *Ex parte Young* exception was inapplicable. See, also, *Harrison v. Hickel*, 6 F.3d 1347 (9th Cir. 1993); *Ulaleo* v. *Paty*, 902 F.2d 1395 (9th Cir. 1990) (action seeking restoration of trust land, though for injunction, seeks retrospective relief).

C. The Injunctive and Declaratory Relief Sought Here is Precluded by Green v. Mansour.

This Court held only 10 years ago that declaratory relief may not be awarded against a state official if the

judgment may have preclusive effect in subsequent proceedings for monetary relief. *Green* v. *Mansour*, 474 U.S. 64 (1985). This is consistent with the rationale that the Eleventh Amendment applies to its fullest extent if an adverse judgment must come from the state treasury. *Edelman* v. *Jordan*, 415 U.S. 651 (1974). That rule is even more appropriate here where, rather than state funds, state public trust lands, acquired under the equal footing doctrine, are at stake. See *Ulaleo* v. *Paty*, *supra*, 902 F.2d 1395.

IV

THE RESPONDENTS HAVE FAILED TO MAKE A CLAIM ON WHICH DECLARATORY AND INJUNCTIVE RELIEF MAY BE BASED

To invoke the *Ex parte Young* doctrine, there must be a violation of federal law or constitutional rights. It is not sufficient that a claim be asserted: "To state a federal claim, it is not enough to invoke a constitutional provision or to come up with a catalogue of federal statutes allegedly implicated. Rather, as (this) Court has repeatedly admonished, it is necessary to state a claim that is substantial. . . . We do not have jurisdiction over a claim, no matter how federal it purports to be, that is 'patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent so as not to involve a federal controversy.' *City of Las Vegas* v. *Clark County*, 755 F.2d 697, 701 (9th Cir. 1980) (quoting *Demarest* v. *U.S.*, 718 F.2d 964, 966 (9th Cir. 1983, cert. denied, 466 U.S. 950 (1984)," cited by Kozinski, J. dissenting in *Native Village of Noatak* v. *Hoffman*, 896 F.2d at 1166).

A. The Presumption Against Conveyance of the Lands is Unrebutted.

This Court has recognized what has been characterized as "the strongest presumption" that Congress will not act to convey sovereign lands rather than preserve them for the State. O'Connor, J., dissenting in *Block* v. *North Dakota*, *supra*, 461 U.S. at 299, citing *Montana* v. *United States*, *supra* at 544, 552 ("A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption in favor of State title.") The states' title to sovereign land comes from the Constitution itself, and does not depend on the largesse of Congress. *Oregon* v. *Corvallis Sand & Gravel Co.*, *supra* 363, 374. See *United States* v. *Oregon*, 295 U.S. 1, 14:

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself . . . For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce."

For those reasons, this Court has held that a conveyance of navigable water must not be inferred "unless the intention was definitively declared or otherwise made plain . . . " *Montana* v. *United States*, *supra*, 450 U.S. at 552.

Here, nothing in the executive order at issue, which described part of the reservation boundary as extending to the center of the Spokane River, indicated an intention to overcome the strong presumption that these waters, held in trust for the State of Idaho, did not pass to the tribe. Nothing in the order or the statutory authority under which it issued "even approaches a grant of rights in lands underlying navigable waters . . . " or evinces a purpose "to depart from the established policy . . . of treating such lands as held for the benefit of the future state." *United States* v. *Holt State Bank, supra,* 270 U.S. at 58-59.

B. Only Congress May Convey Sovereign Lands; and Then "Because of 'Some International Duty or Public Exigency.' "

This Court reiterated its long established rule on the construction of alleged grants of equal footing lands in *Montana* v. *United States,* 450 U.S. 544, 551-552: "The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce . . . " One exception exists: *Congress* may sometimes convey lands below the high-water mark of a navigable water, "but because control over the property underlying navigable water is so strongly identified with the sovereign power of government (citation), it will not be held that the United States has conveyed the land except . . . because of 'some international duty or public exigency.' " (citation.) Furthermore, Congress' intention to convey the sovereign land must be "definitely declared or otherwise made

plain," *Id.,* (quoting *Holt State Bank,* 270 U.S. 49, 55) or rendered "in clear and especial words," (quoting *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 411) or 'unless the claim confirmed in terms embraces the land under the waters of the stream," (quoting *Packer* v. *Bird,* 137 U.S. 661, 672).

The alleged withdrawal here on its face met none of those requirements. There is no expression of congressional intent here to contravene the equal footing doctrine. Accordingly, the motion to dismiss was properly granted. The district court found, on the basis of an ambiguous executive order which was silent on the subject of sovereign lands that no conveyance had been made of the bed and banks of Lake Coeur d'Alene. Indeed, this Lake, and the other navigable waters wholly or partially within reservation boundaries, is merely one of any number of navigable waters, owned by the State under the constitutional equal footing doctrine, that happen to be within a reservation. Cf. *Montana* v. *U.S., supra,* 450 U.S. 544 (Big Horn River); *United States* v. *Minnesota,* 270 U.S. 181 (1926) (swamp and overflow lands); *United States* v. *Aranson,* 696 F.2d 654 (9th Cir. 1983), cert. denied sub nom. *Colorado River Indian Tribes* v. *Aranson,* 464 U.S. 982 (1983) (Colorado River). Thus, as a matter of law, respondents failed to rebut the State's much more than colorable claim. Cf. *Florida Dept. of State v. Treasure Salvors, Inc., supra,* 458 U.S. at 697.

CONCLUSION

As this Court concluded in *Block* v. *North Dakota,* in another context, the *Ex parte Young* doctrine simply does

not fit in the context of disputed titles. An injunction directing state officials and agencies from taking acts inconsistent with the plaintiff's title will amount to a quiet title adjudication, for it will result in effectively giving the plaintiff full use and control of the property. The tribe would be able to lease the bed of Lake Coeur d'Alene, free from constraints of state ownership and presumably free from the public trust constraints to which the state is subject. The State's treasury will be directly affected by its failure to administer and lease the beds and shoreline of the lake and rivers in question, and its public administration of an asset integral to its sovereignty gravely impaired. Should the State attempt to enjoin tribal officials from taking actions inimical to *state* law, the response is predictable. Tribal sovereign immunity would be raised by the plaintiff against any state efforts to adjudicate the propriety of its actions. The street should run both ways.

This Court's reasoning with respect to *federal* officer's suits is applicable here. Injunctive relief simply is not available against the actions of state officers within their statutory authority. For "[t]here are the strongest reasons of public policy for the rule that (injunctive) relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson* v. *Domestic & Foreign Commerce Corp., supra,* 337 U.S. at 682, 704. This principle is applicable here, for the Eleventh Amendment immunity of states is rooted in principles of sovereign

immunity and federalism. *Pennhurst State School & Hosp.* v. *Halderman, supra,* 465 U.S. at 98.

Respectfully Submitted,

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